

On November 6, 2012, Michigan voters will decide whether to approve Public Act 4 of 2011, the Local Government and School District Fiscal Accountability Act. That Act took effect on March 16, 2011, but it was suspended in August 2012 pending a referendum by the voters.

Proposal 12-1 will appear on the ballot as follows:

**A REFERENDUM ON PUBLIC ACT 4 OF 2011
– THE EMERGENCY MANAGER LAW**

Public Act 4 of 2011 would:

- *Establish criteria to assess the financial condition of local government units, including school districts.*
- *Authorize Governor to appoint an emergency manager (EM) upon state finding of a financial emergency, and allow the EM to act in place of local government officials.*
- *Require EM to develop financial and operating plans, which may include modification or termination of contracts, reorganization of government, and determination of expenditures, services, and use of assets until the emergency is resolved.*
- *Alternatively, authorize state-appointed review team to enter into a local government approved consent decree.*

Should this law be approved?

If a majority of the electors vote "yes" on Proposal 12-1, Public Act 4 of 2011 will take effect again.

Public Act 4 of 2011

In addition to creating the Local Government and School District Fiscal Accountability Act, Public Act (PA) 4 repealed the Local Government Fiscal Responsibility Act, which was enacted by Public Act 72 of 1990. Like the earlier law, PA 4 authorizes the appointment of a manager for a local government (a municipality or a school district) that, after a review process, is found to be in a financial

emergency. A key difference is that PA 72 provided for the appointment of an "emergency financial manager", whose authority was limited to the control of financial operations. Public Act 4 provides for the appointment of an "emergency manager" whose powers are considerably broader and are not limited to financial operations. In addition, the newer statute is more comprehensive overall. An overview of the Act follows.

Public Act 4 prescribes a series of steps leading to the determination of a financial emergency and the appointment of an emergency manager. These generally reflect the process under the 1990 law, and involve a preliminary review by the State Financial Authority (the State Treasurer or Superintendent of Public Instruction) if certain conditions exist; the appointment of a review team to investigate, if the preliminary review finds probable financial stress; the review team's report to the Governor of its conclusions (ranging from no financial stress to a financial emergency); a determination by the Governor; the opportunity for a hearing before the State Financial Authority if the Governor finds that a financial emergency exists; and the opportunity to appeal the Governor's determination to the Ingham County Circuit Court.

If the Governor confirms the determination of a financial emergency, he or she is required to declare the local government in receivership and appoint an emergency manager. The local government will be removed from receivership when the financial conditions are corrected in a sustainable fashion, as determined by the State Treasurer.

When an emergency manager is appointed, the governing body and chief administrative officer of the local government are prohibited from exercising any of their powers without the emergency manager's approval, and their compensation and benefits are eliminated during the receivership (but may be restored during that time by the emergency manager). The emergency manager is required to develop a financial and operating plan for the local

government, as well as an academic plan if the local government is a school district.

Public Act 4 lists additional actions that an emergency manager may take, such as revising the local government's budget; applying for a loan from the State; ordering millage elections for the local government; and entering into agreements with other entities for the provision of services, the joint exercise of powers, or the transfer of functions.

The Act also authorizes an emergency manager to reject, modify, or terminate the terms or conditions of existing contracts. This includes collective bargaining agreements, if the emergency manager meets with the appropriate bargaining representatives and concludes that a prompt and satisfactory resolution is unlikely to be obtained.

In addition, an emergency manager may disincorporate or dissolve a municipal government with the approval of the Governor, or recommend consolidation with another municipal government.

For five years after being placed in receivership or until the receivership is terminated, whichever comes first, a local government is not subject to provisions of the public employment relations act that require a public employer to engage in collective bargaining with representatives of its employees.

If certain conditions exist, an emergency manager may recommend to the Governor that a local government be authorized to proceed under Federal bankruptcy law. If the Governor approves, the emergency manager has the authority to proceed.

It is possible for a local government to avoid the appointment of an emergency manager by entering into a consent agreement with the review team in the early stage of the process. A consent agreement can provide for remedial measures necessary to address the local financial problem, and must include a continuing operations plan or a recovery plan. It also can grant a local official some or all of

the powers of an emergency manager, except the authority to reject, modify, or terminate collective bargaining agreements. While a consent agreement is in effect, the local government is not required to engage in collective bargaining, unless the State Treasurer determines otherwise. If the local government is found to be in material breach of the agreement, it can be placed in receivership.

PA 4 Suspension; PA 72 Reinstatement

Article II, Section 9 of the State Constitution reserves to the people the power to approve or reject a law enacted by the Legislature through a referendum. Invoking this power requires petitions to be signed by a number of registered voters equal to at least 5% of the total vote cast for all candidates for Governor at the last general election at which a Governor was elected. Once the power of referendum has been properly invoked, the law is ineffective unless it is approved by a majority of the electors voting on it at the next general election.

Opponents of Public Act 4 proceeded to gather petition signatures in order to subject the Act to a vote of the people. The Board of State Canvassers certified that sufficient signatures had been gathered and, on August 8, 2012, certified the petition for the general election ballot. At that time, PA 4 was suspended.

As noted above, in addition to creating the new statute, PA 4 repealed Public Act 72 of 1990. According to an opinion of Attorney General Schuette, dated August 6, 2012, PA 72 is "temporarily revived" until the results of the November election are known. The Attorney General also held that PA 72 will be "permanently revived" if the voters disapprove PA 4.

Therefore, emergency managers who were appointed under PA 4 are functioning as emergency financial managers under PA 72, with fewer powers, and the procedures under the 1990 law are being followed. (In most cases, the emergency managers were reappointed as emergency financial managers;

in one city, the emergency manager was not eligible for appointment under PA 72 and a previous emergency financial manager was appointed.)

Not everyone agrees with the Attorney General's conclusions, and several legal challenges have been brought. In mid-August, a Wayne County Circuit Court judge ruled that the emergency manager of Detroit Public Schools has financial control under PA 72. On September 26, 2012, a lawsuit was filed in the Ingham County Circuit Court, alleging that there is no emergency financial manager law in effect due to the suspension of PA 4.

Discussion

Public Act 4 of 2011 was the latest in a series of measures designed to address local governments' financial problems. As PA 4 replaced PA 72 of 1990, that statute had replaced a law enacted in 1988, which contained virtually the same provisions but did not apply to school districts. Although various other statutes empower the State to oversee and regulate local finances—by requiring financial reports, audits, and balanced budgets, for example—the laws providing for an appointed manager were enacted to accelerate and strengthen the State's ability to identify local units experiencing fiscal distress and intervene to the extent considered necessary.

According to the Department of Treasury, the following seven local units had been declared to be in a financial emergency under PA 72, and had emergency financial managers appointed for them: the Cities of Benton Harbor, Ecorse, Flint, Hamtramck, Highland Park, and Pontiac, and the Village of Three Oaks. When PA 4 was enacted, Benton Harbor, Ecorse, and Pontiac still had a financial manager in place. As of August 9, 2012, according to the Department, those three cities as well as Flint were in receivership, and emergency managers also had been appointed for the school districts in Detroit, Highland Park, and Muskegon Heights. In addition, as of August 9, the Cities of Detroit, Inkster, and River Rouge were operating under

a consent agreement with a financial review team.

Public Act 4 was enacted due to perceived weaknesses in the 1990 law, particularly with respect to the powers of appointed managers. Proponents believed, and continue to believe, that the State needs broad authority—exercised through an appointed emergency manager—to intervene when municipalities and school districts are experiencing severe financial distress. Arguably, a local government that is in fiscal crisis has demonstrated its inability to manage its affairs, and outside assistance is needed. According to supporters of intervention, the fiscal health of a municipality or school district is a matter of concern both to the local government and to the State. That is, a local fiscal crisis can have an adverse impact not only on the health, safety, and welfare of the local residents—by reducing police and fire protection, for example—but also on the State's credit rating, as well as the future cost of borrowing. In addition, there is widespread agreement that strong measures should be taken to avoid municipal bankruptcies, which many consider the worst-case scenario.

These concerns are reflected in the legislative determinations contained in both PA 72 of 1990 and PA 4 of 2011. The newer law, however, is significantly broader in regard to the pre-emption of local officials' authority and the powers granted to emergency managers. In particular, the power to reject, modify, and terminate contracts—including collective bargaining agreements—and the virtual removal of elected or appointed officials from office, are probably the key features distinguishing PA 4 from the earlier version.

While supporters of the law may consider these features vital to its effectiveness, these provisions also are the focus of much or most of the opposition to PA 4. Critics view the law as an undemocratic measure that denies the will of the people. They point out that elected officials are replaced by an appointed manager who is not accountable to the voters, and who can void or change contracts that have been negotiated in good faith. The ability to break contracts,

which is typically reserved for Federal bankruptcy judges, also raises constitutional questions.

The Referendum

If Proposal 12-1 receives a majority of "yes" votes, Public Act 4 will be reinstated when the results of the election are certified.

If Proposal 12-1 is defeated and PA 4 is rejected, at least two scenarios are possible. As noted above, it is the opinion of the Attorney General that Public Act 72 of 1990 will be "permanently revived". This opinion can be overturned by the courts, however, and the "temporary revival" of PA 4 already is being challenged.

If PA 4 is rejected and PA 72 remains the law, the Legislature can amend that statute, repeal it, or replace it. If PA 4 is rejected and the courts hold that PA 72 is not in effect, the Legislature can enact a new emergency manager law, or consider alternative measures to remedy local financial distress.



Senate Fiscal Agency

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An Overview

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